No. 89-504

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondent's defense of the court of appeals' jurisdictional ruling (see Br. in Opp. 12-38) entirely ignores one of the two alternative theories under which the district court's order is appealable pursuant to 28 U.S.C. 1291 and fails to recognize the distinct nature of judicial review of agency action that underlies the other theory. Respondent's further contention (Br. in Opp. 42-56) that the jurisdictional issue does not in any event warrant review is fatally undermined by her concession that the decision below conflicts with the decisions of five other courts of appeals.

1. a. The district court order in this case is appealable under either of two alternative theories. First, the order is a "final decision" for purposes of 28 U.S.C. 1291 because it constitutes a final rejection of the particular decision of the Secretary before the

district court and therefore terminated the relevant judicial proceedings. The administrative decision before the court denied respondent's application for benefits on the ground that her impairment did not meet or equal the Listing of Impairments, as required by the regulations governing claims for widow's disability benefits. The district court sustained, as supported by substantial evidence, the Secretary's finding that respondent does not have such an impairment. Pet. App. 16a. But instead of affirming the Secretary's decision, the court remanded the cause to the Secretary to inquire into whether respondent is in fact unable to perform any gainful activity. *Id.* at 17a-18a, 25a. Respondent does not dispute that the court's order effectively invalidated the regulation requiring a claimant for widow's benefits to show that she has an impairment that meets or equals the Listing and directed the Secretary to render a new decision under a different legal standard. A district court order having that effect is a "final decision" for purposes of 28 U.S.C. 1291.

The text of 42 U.S.C. 405(g) confirms this conclusion. The fourth sentence of Section 405(g) provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." This language aptly describes what the district court did here: the court "affirm[ed]" the Secretary's decision insofar as he found that respondent does not have an impairment that meets or equals the Listing; it "modif[ied]" or "revers[ed]" the Secretary's decision insofar as it denied respondent's claim on that basis; and it "remand[ed] the cause for a rehearing," at which the Secretary must apply a different legal standard than the one set forth in the governing regulations. Congress's use of the term "judgment" indicates in itself that such an order is appealable, because the word "judgment" is a term of art that "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). But however that may be, the eighth sentence of 42 U.S.C. 405(g) provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

Respondent ignores the fourth and eighth sentences of 42 U.S.C. 405(g), which speak directly to the appealability issue,

and focuses instead (Br. in Opp. 22-27, 29-31, 52-55) on the sixth sentence. In her view, the sixth sentence suggests that essentially all orders that include a remand to the Secretary are interlocutory and nonappealable because that sentence provides for the Secretary to file amended findings and decision with the court after a remand. Respondent misapprehends the statutory scheme.

The sixth sentence of Section 405(g) authorizes the court to order a remand to the Secretary in certain circumstances other than those addressed by the fourth sentence—*i.e.*, other than those in which the court remands the cause as part of its ruling on the merits. The sixth sentence provides:

> The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

The sixth sentence requires the Secretary to file with the court any additional or modified findings of fact or decision he makes on remand because that sentence furnishes a mechanism for conducting further administrative proceedings *before* the court passes on the validity of the Secretary's decision. Thus, it is only after the Secretary reconsiders his own decision in light of the "new evidence" (or in light of other circumstances that prompted a pre-answer remand) that the court can properly pass on the validity of that decision and affirm, modify or reverse it.[1] An order

[1] Respondent's quotation and discussion of the sixth sentence of Section 405(g) (Br. in Opp. 21-24, 28-30) omit any reference to the critical requirement that there be "new evidence" to justify a remand other than one requested by the Secretary prior to filing his answer. It is consistent with the Secretary's

remanding the case for this limited purpose is not appealable under 28 U.S.C. 1291, because it does not constitute a final ruling by the court that the Secretary's decision is erroneous. *Cohen* v. *Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971).

Contrary to respondent's contention, the order in the instant case was not governed by the limited remand authority in the sixth sentence of Section 405(g), because: (i) it was not entered on the motion of the Secretary (either before or after he filed his answer), and (ii) it was not made on the basis of a showing or finding that there was "new evidence" material to the Secretary's decision. Instead, the district court remanded the case to the Secretary only as a consequence of its holding that his decision denying respondent's claim was legally erroneous because it was based solely on the finding that her impairment did not meet or equal the Listing. As we have explained, a remand made only as an incident to the court's ruling on the merits is governed by, and is appealable under, the fourth and eighth sentences of Section 405(g).

Respondent argues (Br. in Opp. 22-23, 29-32, 39-40) that our submission in this regard is inconsistent with *Sullivan* v. *Hudson*, 109 S. Ct. 2248 (1989). That case, however, involved the availability of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), following a remand to the Secretary. The Court did not discuss the appealability of a remand order of the sort at issue here or the specific language in the fourth and eighth sentences of Section 405(g) that refers to such an order as a "judgment" that is "final" and "subject to review in the same manner as a judgment in other civil actions."

b. In the alternative, the order at issue here is appealable under principles analogous to those underlying the "collateral order" doctrine that the Court has applied to certain orders entered in

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primary jurisdiction to require the Secretary to receive and weigh *all* evidence bearing on the claim. And it would be inconsistent with the requirement under 42 U.S.C. Section 405(g) that the district court's judgment be entered "upon the pleadings and transcript of [the administrative] record," for the court to receive and weigh newly discovered evidence in the first instance.

the course of on-going proceedings in a district court. See Pet. 15-16, 21. Respondent does not dispute that the district court decided an important legal issue concerning the validity of the regulations governing applications for widow's disability benefits. She argues, however, that the order is not appealable because that issue is not "completely separate" from the merits of her claim for benefits. Br. in Opp. 18-19, 20-21, quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Respondent disregards the significant legal and practical distinctions, for appealability purposes, between an order remanding a matter to an agency for a new round of administrative proceedings and an order entered in on-going proceedings in the district court itself. As this Court has observed (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)):

> A review by a federal court of the action of a lower court is only one phase of a single unified process. • • • The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limits of the "judicial power" conferred by Congress under the Constitution.

The district court's order in this case was not merely one step toward an adjudication of the merits of respondent's claim for benefits by the court itself. To the contrary, the order removed the claim from the immediate cognizance of the court and returned it to the jurisdiction of the officer of a coordinate Branch in whom Congress has vested the power to adjudicate claims for Social Security benefits, subject only to limited review by the courts. Moreover, the legal issue resolved by the district court cannot be reconsidered by the Secretary in the rehearing on remand, which will address the distinct question whether respondent is in fact unable to perform any gainful activity. The district court's order therefore finally determined the legal issue of the validity of the Secretary's regulation, and that issue is sufficiently distinct from the factual issues that would be resolved on remand

to render the order a "final decision" within the meaning of 28 U.S.C. 1291. Compare *Mitchell* v. *Forsyth*, 472 U.S. 511, 527-528 (1985). That is especially so since entertaining the Secretary's appeal would not interrupt on-going proceedings before either the court or the Secretary, while refusing to entertain the appeal would require new and unwarranted proceedings before the Secretary.

Respondent's related assertion (Br. in Opp. 28-36) that the Secretary should not be permitted to take an appeal now because appellate consideration of the validity of the widow's disability regulations might not be entirely foreclosed following the remand likewise ignores the distinct nature of judicial review of administrative action. As an initial matter, nothing in Section 405(g) expressly provides for the Secretary to obtain judicial review (including appellate review) of his own decision if he determines on remand that he must award benefits under the legal standards imposed by the district court. See Pet. 17 n.10. But even if respondent is correct (Br. in Opp. 28-33) that the Secretary nevertheless may obtain court of appeals review by filing his new decision on remand with the district court, requesting the court to enter a judgment affirming that decision, and then appealing the judgment that affirms his own decision, certainly nothing in Section 405(g) *requires* the Secretary to pursue that awkward course, and thereby to accept the burden of a remand before obtaining appellate review on a dispositive legal issue that underlies his own carefully considered decision denying a claim for benefits. To the contrary, the fourth and eighth sentences of Section 405(g) expressly contemplate that the Secretary may take an immediate appeal from a district court order holding the Secretary's decision denying a claim for benefits legally erroneous, even though the court has remanded the cause to the Secretary for a rehearing and even though the same claim for benefits therefore might be brought back before the district court following the remand. Respondent's proposal to postpone all appellate review until the Secretary has rendered a new decision on remand thus both fails to accord the respect due the official of a coordinate Branch who is charged with administering the Act and conflicts with the text of Section 405(g).

2. Respondent's contention (Br. in Opp. 42-56) that the jurisdictional issue does not in any event warrant review is without merit. We have shown (Pet. 19-25) that the decision below conflicts with the Fifth Circuit's seminal holding in *Cohen* v. *Perales*, *supra*, and with similar holdings by a number of other courts of appeals.

a. In *Perales*, the district court remanded the case to the Secretary for a rehearing under different evidentiary principles. The Fifth Circuit held that it had jurisdiction over the Secretary's appeal on both of the theories discussed above—*i.e.*, that the fourth and eighth sentences of Section 405(g) rendered the remand order an appealable final judgment, and that the order was appealable under principles of practical finality derived from the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 412 F.2d at 48-49. As we have explained (Pet. 22-23), and as respondent does not dispute, the jurisdictional ruling in *Perales* has special significance because it was not disturbed by this Court when it reversed the Fifth Circuit on the evidentiary issue, even though the Court's own jurisdiction under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals.

Respondent questions (Br. in Opp. 55-56) the continuing precedential force of *Perales* as a result of the Fifth Circuit's en banc decision in *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, cert. denied, 469 U.S. 818 (1984). That case, however, involved the distinct question whether the court of appeals had jurisdiction under 33 U.S.C. 921(c) over an order of the Benefits Review Board that remanded a claim to an administrative law judge for further proceedings. In holding that it did not have jurisdiction, the en banc Fifth Circuit did not even cite, much less overrule, *Perales*. Respondent also attempts (Br. in Opp. 52-55) to distinguish *Perales* on the ground that this case involves only a remand for the taking of additional evidence, whereas in *Perales* the Fifth Circuit also made an evidentiary ruling adverse to the Secretary. But as we have explained above, the district court in this case did not simply remand to allow the Secretary to consider newly discovered evidence, while reserving judgment on the validity of the decision of the Secretary

that was before the court on judicial review. Instead, like the Fifth Circuit in *Perales*, it found the Secretary's decision legally erroneous, resolved a distinct legal issue in the process, and remanded to the Secretary for further proceedings under different legal standards. Respondent's attempt to distinguish *Perales* therefore is without merit.

b. We also have shown (Pet. 23-24) that the decision below squarely conflicts with holdings by the First, Sixth, Seventh, Ninth and Tenth Circuits that the Secretary may appeal a district court order holding the Secretary's decision legally erroneous and remanding for further proceedings under different legal standards or evidentiary principles. See *Colon* v. *Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *Lopez Lopez* v. *Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Edmond* v. *Secretary of HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989); *Daviess County Hospital* v. *Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc.* v. *Bowen*, 857 F.2d 1123 (7th Cir. 1988); *Jamieson* v. *Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963); *Stone* v. *Heckler*, 722 F.2d 464, 466-468 (9th Cir. 1983); *Ensey* v. *Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso* v. *Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case).[2] Indeed, the Secretary's appeal in *Edmond* presents the same issue on the merits as his appeal in the instant case (the validity of the widow's disability regulations), and the Sixth Circuit, in contrast to the court below, held that it has jurisdiction over the Secretary's appeal from the district court's order remanding the cause to the Secretary to determine whether the claimant can engage in any gainful activity. See also *Davidson* v. *Secretary of HHS*, No. 88-1472 (10th Cir. Oct. 12, 1989) (making a "preliminary determination" in favor of jurisdiction over Secretary's appeal in similar widow's case).

[2] The Fourth, Eighth, and Eleventh Circuits also have held such orders appealable (*Souch* v. *Califano*, 599 F.2d 577, 578 n.1 (4th Cir. 1979); *Gardner* v. *Moon*, 360 F.2d 556, 558 n.2 (8th Cir. 1966); *Pickett* v. *Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987)), although, without mentioning those rulings, the Fourth and Eleventh Circuits have recently held (and the Eighth Circuit has recently stated in dictum) that such an order is *not* appealable. See Pet. 24 & n.19.

Respondent points out (Br. in Opp. 47-49) that several of the cases upon which we rely involved challenges to the jurisdiction of the district court or a requirement that the Secretary redetermine the claim under different evidentiary standards. But respondent does not explain why this distinguishes the cases for purposes of appellate jurisdiction, since her contention that a legal issue resolved by the district court in remanding the cause should be raised in an appeal following the remand would apply equally to those issues. Moreover, even if we assume, *arguendo*, that the distinctions respondent identifies in these cases are material, she does not even attempt to distinguish the *other* cases upon which we rely. She merely refers to them as a "small number" of decisions that have allowed appeals without extended discussion. Br. in Opp. 49-50 & n.10. This effort to minimize the clear circuit conflict is unavailing, because the contrary decisions she attempts to dismiss in this manner were rendered by no less than *five* other circuits. Moreover, two of those five decisions were rendered prior to and were cited in support of the jurisdictional ruling in *Perales* itself (see 412 F.2d at 48, citing *Jamieson* and *Gardner*); two others expressly relied upon *Perales*, which did extensively discuss the appealability issue (see *Lopez Lopez*, 512 F.2d at 1156; *Paluso*, 573 F.2d at 8); and the fifth (and most recent) was rendered only after the Sixth Circuit specifically requested the Secretary to brief the jurisdictional issue (*Edmond*). Finally, although the question of the appealability of remand orders has generated the most litigation and conflicting rulings in Social Security cases, the right of the agency concerned to appeal a remand order has been sustained in other contexts as well. See *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 329-330 (D.C. Cir. 1989); Pet. 23-25. This important and recurring jurisdictional issue therefore warrants resolution by this Court.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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